No. 20667

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JESS H. NICHOLAS, JR., Appellant

v.

SECRETARY OF THE DEPARTMENT OF INTERIOR, AND THE UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

SUPPLEMENTAL BRIEF FOR THE APPELLEE

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This brief is filed pursuant to permission granted y order of October 21, 1966. Since appellee's brief was filed, he case of Coleman v. United States, 363 F.2d 190 (C.A. 9, 966), heavily relied upon by appellant, was decided. In our etition for rehearing in that case, we outlined some of the espects in which we disagree with much of the reasoning of hat decision. Similar language appears in Stewart v. Penny, 38 F.Supp. 821 (D. Nev. 1925). The attempted application of he language of Coleman to this case makes clear, we submit, ts error.

A. The United States was an indispensable party which had not consented to this suit. - Appellant seeks a judgment "awarding to the Plaintiff the right to the public lands herein." In White v. Administrator of General Services Admin. of U. S., 343 F.2d 444 (C.A. 9, 1965), this Court said (p. 445):

> The object of the appellants in the instant suit is to get the title out of the United States and into the appellants. A suit with such an objective is a suit for specific performance, regardless of what may be said in the complaint which initiates the suit. And, the title to the interest which the court is asked to order to be conveyed to the appellants being now in the United States, the order would have to be made against the United States. It follows that the United States would have to be a party to the suit.

Appellant's sole reference in the complaint as to jurisdiction was the Administrative Procedure Act, 5 U.S.C. sec. 1009. In White, supra, this Court said (p. 447): "We find nothing in the statutes relating to declaratory judgments or administrative procedure which is helpful to the appellants." "Still less is the [Administrative Procedure] Act to be deemed an implied waiver of all governmental immunity from suit." Blackmar v. Guerre, 342 U.S. 512, 515-516 (1952). "The Administrative Procedure Act, 5 U.S.C. § 1001 et seq., does not purport

to give consent to suits against the United States." Chournos v. United States, 335 F.2d 918, 919 (C.A. 10, 1964).

B. The broad review sought by appellant against the Secretary of the Interior was not available in the district court

Again relying on Coleman, appellant argues for a broad power of courts to supervise public land decisions of the Secretary of the Interior. Until 1962, only the courts of the District of Columbia had jurisdiction to review actions of the Secretary denying requested patents or other interests in the public domain. And that was a very narrow mandamus jurisdiction. That same narrow jurisdiction has now been extended to all district courts by 28 U.S.C. sec. 1361. "It is clear that the Act did not enlarge the scope of mandamus relief." Prairie Band of Pottawatomie Tribe of Indians v. Udall, 355 F.2d 364, 367 (C.A. 10, 1966); cf. White, supra. In Prairie Band, the court described the mandamus rule as follows (p. 367):

> Historically, mandamus is an extraordinary remedial process awarded only in theexercise of sound judicial discretion. Before such a writ may issue, it must appear that the claim is clear and certain and the duty of the officer involved must be ministerial, plainly defined, and peremptory.

> Huddleston v. Dwyer, 10 Cir., 145 F.2d 311. The duty sought to be exercised must be a positive command and so plainly prescribed as to be free from doubt. Wilbur v. United States ex rel. Kadrie, 281 U.S. 206, 50 S.Ct. 320, 74 L.Ed. 809.

Appellant can make no such showing here.

We submit that recent Supreme Court decisions in Boesche v. Udall, 373 U.S. 472 (1963), and Udall v. Tallman, 380 U.S. 1 (1965), answer the notion of Coleman that somehow the passage of the Administrative Procedure Act restricted the discretion in disposal of public domain which has existed since formation of the Union. Cf. White, supra, at p. 447, that it is not to be assumed there has been taken "such a revolutionary step on the part of Congress as the overturning of what had been settled law since the foundation of the Government, * * *."

Some fundamentals need restating. Congress has plenary power to control the disposition of the public domain. Alabama v. Texas, 347 U.S. 272, 273-274 (1954).

> The determination of the validity of claims against the public lands was entrusted to the General Land-Office in 1812 (2 Stat. 716) and transferred to the Department of the Interior on its creation in 1849. 9 Stat. 395. Since that time, the Department has been granted plenary authority over the administration of public lands, including mineral lands;

> and it has been given broad authority to issue regulations concerning them. Cameron v. United States, supra--an opinion written by Mr. Justice Van Devanter, who, as Assistant Attorney General for the Interior Department from 1897 to 1903, did more than any other person to give character and distinction to the administration of the public lands--illustrates the special role of the Department of the Interior in that field.

Best v. Humboldt Mining Co., 371 U.S. 334, 336-337 (1963).

The courts, especially the Supreme Court, have always been careful not to interfere with that "plenary authority over the administration of public lands" by undertaking broad "judicial review," i.e., supervision of that real estate disposal function. This history still prevails today and is the backgrou against which the review authority of the courts is to be tested The Coleman opinion mistakenly assumes that the court-Interior Department relations are similar to those between the courts and regulatory agencies formed mostly during the present century We submit that, as stated in Best, the Cameron principle is good law today.

As to alleged estoppel, attention should be called to Beaver v. United States, 350 F.2d 4 (C.A. 9, 1965), cert. den., 383 U.S. 937.

For the foregoing reasons, it is respectfully submitte that the judgment of the district court should be affirmed.

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